Supreme Court, U.S.
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No. 01-OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL RAILROAD PASSENGER CORPORATION,

Petitioner,

v.

JOSEPH P. GRIESSER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a FELA action, where the jury is being asked to determine the period for which future lost wages and benefits should be awarded, the lower court erred when it concluded that the collateral source rule should be expanded to bar evidence that a railroad employee would be eligible to receive full retirement benefits at age 60, which evidence was offered to show that it was more likely that the employee would retire at 60 instead of 65 or 70?

2. Assuming that such evidence does constitute collateral source evidence, whether the lower court erred when it concluded that *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (per curiam), absolutely prohibits in a FELA case *any* balancing analysis to determine whether the probative value of the evidence outweighs any prejudicial impact?

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties below are named in the caption. Petitioner National Railroad Passenger Corporation ("Amtrak") is a corporation providing intercity passenger rail service. Amtrak has no parent company. American Premiere Underwriters, Inc. and Burlington Northern Santa Fe Railroad Company own 10% or more of Amtrak's stock. Respondent, Joseph Griesser, was an employee of Amtrak.

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Petitioner Amtrak respectfully petitions this Court for a writ of certiorari to review a decision of the Superior Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Philadelphia County denying respondent's motion for a new trial is unreported and is reproduced in the Appendix at 17a. The opinion of the Superior Court of Pennsylvania vacating the judgment of the trial court and remanding for a new trial is reported at 2000 Pa. Super. 1999, 761 A.2d 606 (2000), and is reproduced at 1a. The order of the Supreme Court of Pennsylvania denying Amtrak's petition for allowance of appeal is reported at 2001 WL 435436 (April 26, 2001), and is reproduced at 43a.

STATEMENT OF JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on October 19, 2000. The Supreme Court of Pennsylvania denied Amtrak's petition for allowance of appeal on April 26, 2001. This petition is timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

FEDERAL STATUTE INVOLVED

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, states in pertinent part:

> Every common carrier by railroad, while engaging in commerce between any of the several states . . . shall be liable in damages to any person

> suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . .

45 U.S.C. § 51.

STATEMENT OF THE CASE

A. Procedural History

On February 7, 1994, respondent Joseph Griesser, an Amtrak employee, was injured while working on a truck. Respondent brought an FELA action against Amtrak in the Court of Common Pleas of Philadelphia County. Respondent claimed that he suffered a permanent, disabling lower back condition as a result of the accident. Amtrak contended that his medical condition was not severe enough to prevent his return to work and that his back condition was not caused by the accident.

Following a five day trial, the jury found Amtrak and respondent each 50% negligent. They awarded damages of $419,500 consisting of $99,750 for past lost wages and benefits; $71,250 for future lost wages and benefits; $162,562 for past pain and suffering; and $85,938 for future pain and suffering. R. 617a-619a.[1] A judgment in favor of respondent was entered in the amount of $209,750, reflecting his 50% contributory negligence.

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1. Reference to "R. ___" are to the record before the Superior Court of Pennsylvania.

Respondent appealed to the Superior Court of Pennsylvania, which vacated the judgment and remanded for a new trial. The Superior Court concluded that the trial court had violated this Court's decision in *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (per curiam), when it allowed Amtrak to introduce evidence that respondent would have been eligible for retirement benefits at age 60, which Amtrak had used to rebut respondent's claim that he would have worked to age 65 or 70. Amtrak timely filed a petition for allowance of appeal to the Supreme Court of Pennsylvania, which was denied without comment on April 26, 2001.

B. The Evidence in Question

The issue on this petition arises from respondent's claim for future lost wages and benefits. Respondent, who was 45 years old at the time of trial, had worked for Amtrak since 1977. Respondent's economist repeatedly stated that his economic loss calculations were based on the assumption that respondent would work to either 65 or 70. R. 291a-295a, 306-307a.

The Superior Court's decision to order a new trial was based solely on the following two portions of the testimony. First, on cross-examination, Amtrak's counsel asked respondent's economist the following question:

> Q Are you aware that railroad employees who attain the age of 60 who have 30 years of experience are entitled to full retirement benefits?
>
> A No. I don't know the exact wording of it.

R. 300a; *see* R. 297a. Respondent objected to the question and claimed that Amtrak's counsel improperly inquired into

collateral source benefits. The court overruled the objection, but cut off any further cross-examination by Amtrak because it might inadvertently lead to testimony as to any benefits respondent was *currently* receiving due to his disability.[2]

Second, during Amtrak's case, it presented an economist who testified as to respondent's future lost wages as follows:

> I measured — assuming he would retire at 60, 62, and 66. Sixty is the age given [respondent's] seniority he could have retired from the railroad and would have been eligible for benefits. . . . [A]t age 62 if he were to retire then it turns out that given the pension benefits he would have been eligible for, he would be basically making as much after taxes from pension as he would from earnings.

R. 503a.

C. The Trial Court's Opinion On The Post-Trial Motion

Respondent argued in his post-trial motion that the evidence cited above violated the collateral source rule and as such, he was entitled to a new trial. The trial judge concluded that evidence that respondent could retire at age 60 with retirement benefits did not violate the collateral source rule. The court reasoned that it had properly allowed a "narrow" inquiry into this area in order to allow Amtrak to rebut respondent's claim that he would have worked until age 65 or 70. 26a-27a.

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2. *See* R. 301a ("[M]y concern is now that we are going to introduce inadmissible evidence over *current* benefits. I am going to suggest that you cut it off at this point because it is ready to come out of his mouth.") (emphasis added).

D. The Superior Court's Opinion

Respondent appealed to the Superior Court arguing that the collateral source rule was violated by the admission of evidence that respondent could retire at age 60 with retirement benefits. The Superior Court agreed, vacated the judgment and remanded for a new trial on liability and damages.

According to the Superior Court, this result was compelled by *Eichel*, in which this Court ruled that a railroad employer could not introduce evidence that a plaintiff was receiving disability benefits because of his injury. The Superior Court described *Eichel* as

> a straight forward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff has received compensation on account of his injury from a source other than the defendant.

8a, quoting *Hileman v. Pittsburgh & Lake Erie R.R. Co.*, 546 Pa. 433, 685 A.2d 994, 997 (1996). The Superior Court then acknowledged the fundamental difference between *Eichel* and the instant case:

> The instant case presents a more attenuated link between the injury and the benefits at issue. The benefits at issue are future retirement pension benefits and not current disability benefits. *Thus, the benefits are not related to the injury.*

9a (emphasis added).

Nevertheless, the Superior Court concluded that the evidence in question was barred by the collateral source rule. It clearly recognized, however, that it was breaking new ground:

> We understand that future retirement benefits are not triggered by the injury; rather, they would have been awarded even if [respondent] had not been injured. Moreover, future retirement benefits do not improperly suggest that the [respondent] is currently being compensated for his injury from another source. *In these respects, the evidence at issue is not "classic" collateral source evidence.*

14a (emphasis added). Despite this, the Superior Court concluded that evidence of respondent's "future retirement benefits was inadmissible to show that [respondent] had an economic incentive to retire before age 65, because of the danger that the jury would use the evidence for the improper purpose of mitigating [respondent's] damages or reducing Amtrak's liability." 15a. Such a result supposedly was required by "the strong policy against the admission of collateral benefits in FELA cases," *i.e.*, *Eichel* and its progeny. 15a.

The Superior Court also rejected Amtrak's argument that respondent had "opened the door" when his expert testified he would have retired at age 65 or 70. Inexplicably, the Superior Court "agree[d] that Amtrak should be able to present evidence tending to show that [respondent] would not work beyond age 60," but in the same breath stated that "this evidence should not include the availability of early retirement benefits." 16a. The availability of such benefits, of course, is the very reason why respondent would have incentive to retire at 60.

In this regard, the Superior Court determined that the trial court had absolutely no discretion to balance the probative value and prejudicial impact of the evidence. Although it acknowledged federal appellate case law that would permit such a balancing test, the Superior Court read the Supreme Court of Pennsylvania's decision in *Hileman* as prohibiting any balancing analysis in a FELA case and thus it was "not at liberty to come to a different result." 16a.

REASONS FOR GRANTING THE WRIT

The Superior Court, by its own admission, expanded the collateral source rule as set forth by this Court in *Eichel* to a situation never addressed or contemplated in *Eichel*. Unlike the disability benefits in *Eichel*, the retirement benefits in this case are not evidence of a benefit that respondent was *currently* receiving nor are they paid because of his injury. Indeed, they are not even evidence of a benefit he will *receive* in the future. Rather, it is evidence of a future benefit that respondent *lost* because of the accident, which allegedly prevented him from working to 60 and obtaining those retirement benefits. The irony and injustice of the Superior Court's ruling is that while a FELA plaintiff can claim lost retirement benefits as part of his future economic loss claim, the railroads are now prevented from introducing evidence of those benefits to challenge the plaintiff's claim that he would have worked to age 65 or 70.

This Court should review the decision below in order to correct this gross distortion of the collateral source rule. Because the evidence at issue was neither related to the injury nor improperly suggested that respondent was already compensated for his loss, its admission did not implicate *Eichel*. The Superior Court's decision is the latest in a

growing line of FELA cases that feel compelled by *Eichel* to preclude evidence of retirement benefits to rebut a claim of an expected work life until age 65 or 70. Without this Court's intervention, the lower courts will continue to misapply *Eichel* to exclude highly relevant evidence needed to defend the enormous claims for future lost wages and benefits that are asserted in FELA cases.

Assuming *arguendo* this evidence is collateral source evidence, the Superior Court erred in finding that *Eichel* is an absolute, per se bar to any balancing of the probative value and prejudicial effect of admission of this evidence. The federal courts of appeals and state appellate courts are split on this issue. This Court's own language in *Eichel* that "the likelihood of misuse [of disability benefits] by the jury clearly outweighs the value of this evidence," 375 U.S. at 255, indicates that a balancing analysis is appropriate. This Court's review is necessary to confirm that a trial court, with its unique knowledge of the entire case, may perform a balancing analysis when considering the admission of evidence of this type.

I. THE COURT SHOULD GRANT THE WRIT TO MAKE CLEAR THAT *EICHEL* DOES NOT REQUIRE THE EXCLUSION OF REBUTTAL EVIDENCE REGARDING A RAILROAD EMPLOYEE'S ELIGIBILITY TO RETIRE AT AGE 60

A. After 38 Years, This Court Should Review *Eichel* To Clarify That It Does Not Preclude The Type Of Rebuttal Evidence Offered In This Case

Enacted at the beginning of the last century, the FELA imposes upon the railroad industry a tort-based compensation system for employees injured on the job. Thus, unlike virtually every other industry today in the United States,[3] the railroad industry must compensate injured employees under a system that contains no set limits for economic and non-economic losses. As a result, seven figure jury awards are not at all unusual for railroad employees injured on the job. Every year thousands of FELA suits are filed in the federal and state courts which share jurisdiction for such actions.[4]

In addition to being afforded unique treatment through coverage under the FELA, railroads and their employees

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3. Seamen are also covered under the FELA by virtue of the Jones Act, 46 U.S.C. App. § 688, which extends to seamen the remedies available to railroad workers under the FELA. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 29 (1990).

4. From 1995 through 1999, nearly 33,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to the Association of American Railroads (AAR) by AAR members (and other railroads) in response to annual surveys.

are covered by the Railroad Retirement Act ("RRA"), 45 U.S.C. §§ 231-231u, another system design exclusively for the railroad industry. The RRA provides railroad employees with two very different kinds of benefits and the failure of the lower courts to distinguish between those different benefits gives rise to this petition. First, railroad employees are entitled to "disability" benefits if they demonstrate a physical or mental condition which disables them from working in their "regular occupation" or "in any regular employment."[5] Second, regardless of disability, railroad employees are entitled to "retirement" benefits based strictly on age and years of service.[6] For example, employees who have reached the age of 60 and completed

5. The RRA provides disability benefits for "individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty." 45 U.S.C. § 231a(a)(1)(iv). In addition, disability benefits are payable, regardless of age, to individuals with 10 years of service "whose permanent physical or mental condition is such that they are unable to engage in any regular employment." 45 U.S.C. § 231a(a)(1)(v). The occupational disability benefits are funded by Tier II payroll taxes of which the railroad pays about 77% and the employee pays the balance. *Compare* 26 U.S.C. § 3221(b) *with* 26 U.S.C. § 3201(b). Thus, in fiscal year 1999, railroads paid about $1.9 billion of the total Tier II payroll tax of $2.5 billion. *See* U.S. RAILROAD RETIREMENT BOARD, 1999 ANNUAL REPORT 9 (2000).

6. Because disability benefits under the Railroad *Retirement* Act are paid by the Railroad *Retirement* Board, and because an employee on total disability is considered "retired," it is easy to confuse disability benefits with the retirement benefits discussed in the text. As used in this petition, the term "retirement benefits" will refer exclusively to the second type of benefit discussed in the text.

30 years of service are entitled to retirement benefits. 45 U.S.C. § 231a(a)(1)(ii).[7]

The FELA provides no guidance on the method of calculating damages or the impact of disability and retirement benefits on that calculation. Thus, the railroads rely on the common sense of the federal and state courts to shape this area of FELA damages law.[8] In the 93 year history of the FELA, this Court has addressed the interplay of FELA damages and railroad benefits but once, and that was the brief per curiam opinion 38 years ago in *Eichel*.[9] In recent years, this Court has not hesitated to step in and restore order and logic to other aspects of the FELA law on damages when it has taken a wrong turn. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 341 (1988) (award for future lost earnings should be discounted to present value); *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493-94 (1980) (the "realistic" measure of damages for future lost earnings is

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7. Individuals who have reached the age of 62 and have between 10 and 30 years of service are paid retirement benefits at a lesser rate. 45 U.S.C. § 231a(a)(1)(iii).

8. Because FELA actions filed in state court cannot be removed to federal court, 28 U.S.C. § 1445(a), state courts play an unusually significant role in interpreting this federal statute, as the instant case illustrates.

9. On several occasions, the railroads have unsuccessfully petitioned this Court to take another look at *Eichel*. *See, e.g., Giddens v. Kansas City Southern Ry. Co.*, 29 S.W.3d 813 (Mo. 2000), *cert. denied*, 121 S. Ct. 1644 (2001); *Green v. Denver & Rio Grande Western R.R. Co.*, 59 F.3d 1029 (10th Cir.), *cert. denied*, 516 U.S. 1009 (1995).

after-tax income; jury also should be instructed that its award will not be subjected to any income taxes).[10]

This case is a classic example of the FELA law on damages taking a wrong and totally illogical turn. Petitioner respectfully submits that after 38 years it is time for this Court to exercise its authority and restore some common sense to the collateral source rule as applied in FELA cases. "The collateral source rule allows a plaintiff to seek full recovery from a tortfeasor even though an independent source has compensated the plaintiff in full or in part for the loss." *See Green v. Denver & Rio Grande Western R.R. Co.*, 59 F.3d 1029, 1032 (10th Cir. 1995). This rule was intended to avoid the "danger of a jury finding no liability or reducing a damage award when it learns that plaintiff's loss is entirely or partially covered." *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 840 (1st Cir. 1998) (internal quotation omitted).

When this Court addressed the FELA collateral source rule for the first (and only time) in *Eichel* in 1963, it was confronting a very narrow issue. The trial court had excluded evidence of the plaintiff's receipt of disability benefits that he had received as a result of his accident and that had been offered to impeach the plaintiff as to his motive for not returning to work. Before this Court, the railroad did *not* contest that the disability benefits constituted a collateral source and thus did "not dispute that it would be highly improper for the disability pension payments to be considered in mitigation of the damages suffered by [the plaintiff]."

10. *See also Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 432 (1997) (FELA plaintiffs may not recover damages for negligent infliction of emotional distress for exposure to asbestos until they manifest symptoms).

375 U.S. at 254. In *dictum* that has haunted the railroads for decades, the Court then went on to say:

> Thus it has been recognized that:
>
> The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers. * * * The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer. *New York, N.H. & H.R. Co. v. Leary*, 1 Cir., 204 F.2d 461, 468, cert. denied, 346 U.S. 856.

Id.[11]

The Court then rejected the railroad's argument that despite the conceded inadmissibility of collateral source payments, the disability benefits were nevertheless admissible to show that the plaintiff was malingering. Employing a classical balancing test, the Court stated:

> In our view the likelihood of misuse by the jury clearly outweighs the value of this evidence. Insofar

11. Although the Court need not determine the validity of that *dictum* in this case, it is worth noting that Amtrak, like every other major railroad in the country, disputes that *dictum* and the Court's suggestion that disability benefits are a collateral source. Because the railroad in *Eichel* did not contest the issue, it was evidently never briefed or argued to this Court. In addition, the disability benefits in *Eichel* were being paid pursuant to the Railroad Retirement Act of 1937. Under the Railroad Retirement Act of 1974, it is clear that the railroads pay for 77% of occupational disability benefits. *See* footnote 5 *supra*. Thus, contrary to the *Leary* case quoted in the *Eichel dictum*, the benefits *are* "directly attributable to the contribution of the employer."

> as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension.

Id. at 255.

Thus, as the Superior Court recognized, *Eichel* involved "a straightforward application of the collateral source rule: a defendant may not introduce evidence that a plaintiff *has received* compensation *on account of his injury* from a source other than the defendant." 8a (quoting *Hileman*, 546 Pa. at 439, 685 A.2d at 997) (emphasis added). Thus, the critical fact in *Eichel* was that the plaintiff "was currently receiving disability benefits which were directly attributable to the injury at issue." 8a.

The disability benefits at issue in *Eichel* are fundamentally different than the retirement benefits in this case. To its credit, the Superior Court acknowledged that retirement benefits are to be paid in the future and are in no way attributable to respondent's injury:

> The instant case presents a more attenuated link between the injury and benefits at issue. The benefits at issue are future retirement pension benefits and not current disability benefits. Thus the benefits are not related to the injury.

9a. For this reason, the Superior Court correctly noted that evidence of retirement benefits is not "classic" collateral source evidence. 14a.

The Superior Court also noted that the traditional reasons for application of the collateral source rule were not present here:

> We understand that future retirement benefits are not triggered by the injury; rather, they would have been awarded even if [plaintiff] had not been injured. *Moreover, future retirement benefits do not improperly suggest that the plaintiff is currently being compensated for his injury from another source.*

14a (emphasis added). Nevertheless, the Superior Court felt compelled by *Eichel*, not just to follow it, but to expand it to preclude evidence of the retirement benefits.

And so, after 38 years — and without any intervening supervision by this Court — *Eichel* has now been twisted into a hard and fast rule that precludes evidence of retirement benefits. This is so even though those benefits: (1) were to be paid in the future; (2) are totally unrelated to the injury giving rise to the lawsuit; (3) "do not improperly suggest that this plaintiff is currently being compensated for his injury from another source" (14a); and (4) are to be used to rebut a plaintiff's claim that he would have worked to age 65 or 70 to inflate a lost wage claim.

The result reached by the lower court here, and the line of cases upon which it relied, bears no resemblance to the fact pattern in *Eichel*. It is not only unwarranted and illogical, it is incredibly unfair to the railroads. The retirement benefits at issue in this case were to be paid in the future at retirement and thus are often part of a plaintiff's claim for future lost fringe benefits. Indeed, a FELA plaintiff, as part of his

damage claim, "is entitled to recover damages for any diminution of the plaintiffs' retirement benefits caused by his injury." *Adams v. Burlington Northern R.R. Co.*, 865 S.W.2d 748, 750 (Mo. Ct. App. 1993). *See Raines v. New York Central R.R. Co.*, 51 Ill. 2d 428, 283 N.E.2d 230, 233 (1972) (FELA plaintiff could assert claim for lost retirement benefits even though he had been employed by railroad for only nine days prior to his injury and his right to benefits would not have vested for ten years).

In short, the FELA plaintiff can tell the jury about retirement benefits to support a claim for future lost fringe benefits, but the FELA defendant can not introduce evidence of those same benefits to argue that the plaintiff was likely to retire at age 60 instead of 65 or 70. Remarkably, it is this Court's decision in *Eichel* that has been used to achieve such a perverse result. After 38 years and no further explanation from this Court, *Eichel* has been turned upside down and inside out. Instead of precluding evidence of disability benefits currently being received because of the injury giving rise to the lawsuit, as in *Eichel*, the courts now feel compelled by *Eichel* to preclude FELA defendants (but not FELA plaintiffs) from introducing evidence of retirement benefits to have been paid in the future that are totally unrelated to the accident at issue.

B. The Court Should Grant The Writ To Resolve The Split Between The Pre-*Eichel* And Post-*Eichel* Cases On This Issue

The Superior Court of Pennsylvania's decision is not merely an isolated misapplication of *Eichel*. It found support for its decision in a growing line of state and federal cases that have excluded evidence of retirement benefits.

See, e.g., Brumley v. Federal Barge Lines, Inc., 78 Ill. App. 3d 799, 396 N.E.2d 1333, 1339-40 (1979); *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 821-22 (5th Cir. 1965); *Kimmen v. Consolidated Rail Corp.*, 1999 WL 148360, *3 (E.D. Pa. Mar. 17, 1999); *Lee v. Consolidated Rail Corp.*, 1995 WL 734108, *4-6 (E.D. Pa. Dec. 5, 1995). In fact, ever since *Eichel*, the cases on this issue have all gone one way — against the railroads — even though *Eichel* had nothing to do with retirement benefits.

The law was not always so. Before *Eichel*, the Second Circuit had stated that a railroad could introduce evidence that a FELA plaintiff was eligible to retire at age 65 with full retirement benefits because it was relevant "to the question of whether he might retire in the future, and hence not suffer a loss of earnings attributable to his injury." *Murray v. New York, New Haven & Hartford R.R. Co.*, 255 F.2d 42, 45 (2d Cir. 1958). Similarly, the Fifth Circuit had held that evidence of retirement benefits was admissible in a FELA case because it was relevant "to determine whether plaintiff retired because of his injuries or because of his age." *Page v. St. Louis Southwestern Ry. Co.*, 312 F.2d 84, 94 (5th Cir. 1963).[12]

The decision below and the cases it relied upon are in direct conflict with these pre-*Eichel* rulings. This Court should take this case to resolve the split between the pre and post-*Eichel* line of cases.

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12. *Page* was cited with approval by *Eichel* for the general proposition that an award of damages should not be reduced by payments made to the injured person from a collateral source independent of the wrongdoer. 375 U.S. at 254 n.1. The *Eichel* Court was surely aware that *Page* upheld the *admission* of retirement benefits and thus it appears that this Court did not disapprove of its conclusion. Nevertheless, after a new trial, the Fifth Circuit felt compelled by *Eichel* to reverse course and exclude the evidence. *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 821-22 (5th Cir. 1965).

C. It Does Not Make Sense To Expand The Collateral Source Rule In FELA Cases When It Is Being Cut Back Outside the FELA Arena

This Court has stated that its interpretation of the FELA should be "informed by reference to the evolving common law." *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 429 (1997) (internal quotation omitted). As such, it is important to note that the collateral source rule, whose origin dates back to 1854, has come under increasing criticism by courts and legal scholars alike. *See Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128, 134 (3d Cir. 1991) ("We concede that the continuing vitality of the collateral source rule has been challenged on the ground that its economic justification is marginal at best . . . .").[13]

In recent years, a number of states have severely restricted or eliminated the collateral source rule.[14] Thus, if the collateral

13. Critics of the rule argue that it results in an improper double recovery for plaintiff and actually misleads the jury because it hides information relevant to the jury's accurate assessment of damages. Joel K. Jacobsen, *The Collateral Source Rule and the Role of the Jury*, 70 Or. L. Rev. 523, 541 (1991) (arguing that "courts should not stretch the rule so as to interfere with the jury's calculation of damages"); PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 193 (1988) ("The collateral source rule is the first and most vivid object lesson in how not to do things. . . . The rule could not be more wrongheaded . . . ."); *Unreason in the Law of Damages: the Collateral Source Rule*, 77 Harv. L. Rev. 741, 753 (1964) (noting that invocation of the collateral source rule has "too often been a substitute for analysis of the merits of the parties' claims").

14. *See* Michael F. Flynn, *Private Medical Insurance and the Collateral Source Rule: A Good Bet?*, 22 U. Tol. L. Rev. 39, 57-58 (Cont'd)

source rule is being cut back or restricted by state law, this Court should be wary of its expansion in FELA cases, especially in circumstances where the evidence in question is not "classic" collateral source evidence.

II. IF THE EVIDENCE IN QUESTION WAS COLLATERAL SOURCE EVIDENCE, THEN THIS COURT SHOULD RESOLVE THE SPLIT IN THE LOWER COURTS OVER WHETHER *EICHEL* ABSOLUTELY PROHIBITS ANY BALANCING ANALYSIS TO DETERMINE ADMISSIBILITY

Even the Superior Court in this case recognized that "Amtrak should be able to present evidence tending to show that [respondent] would not work beyond age 60" to rebut his claim that he would have worked until 65 or 70. 16a. Indeed, it is simply not fair to allow a FELA plaintiff to seek damages for future lost wages and benefits until age 65 or 70, but not allow a railroad to rebut that claim with evidence that the plaintiff likely would have retired at an earlier age.[15] The age at which a plaintiff would have retired

(Cont'd)

(1990) (noting that states have used several methods to limit the collateral source rule including enacting legislation specifically permitting offset of particular collateral source payments); Daena A. Goldsmith, *A Survey of the Collateral Source Rule: the Effects of Tort Reform and the Impact on Multistate Litigation*, 53 J. Air L. & Com. 799, 808-09 (1988) (listing states that have either limited or abolished the collateral source rule and noting that at least 31 states have limited the rule in particular types of actions and at least 11 have replaced the rule with a statutory scheme that eliminates it).

15. *See* 5 HON. LEONARD B. SAND, *ET AL.*, MODERN FEDERAL JURY INSTRUCTIONS ¶89.04 (2001) ("Regarding the number of years which the plaintiff would have worked, you have heard testimony from plaintiff's

(Cont'd)

makes a significant difference in the future economic loss calculation.[16] Indeed, where *Eichel* is not an issue, such evidence is clearly admissible.[17]

Even assuming *arguendo* that the evidence in question was collateral source evidence, the Superior Court improperly concluded that the trial court could not perform a balancing test to determine whether the probative value of this particular type of collateral source evidence outweighed

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(Cont'd)
expert and defendant's expert, and life expectancy and work-life expectancy tables have been admitted into evidence. It is for you to determine, based on all of this evidence, how many additional years the plaintiff would have worked.").

16. For example, respondent's economist calculated lost wage at $856,216 or $713,504, depending on whether respondent retired at 70 or 65. R. 294a-295a. Under the analysis used by Amtrak's economist, future lost wages were $565,000 or $697,000, depending on whether plaintiff retired at 60 or 66. R. 507a. The same is true for future fringe benefits lost.

17. *See, e.g., Finch v. Hercules, Inc.*, 941 F. Supp. 1395, 1414-17 (D. Del. 1996), *aff'd*, 124 F.3d 186 (3d Cir. 1997) (where a non-FELA plaintiff testified that he intended to work until age 65 or 70, the defense economist was allowed to testify that the plaintiff would have an incentive to retire before then because he would have access to an annual retirement annuity at age 62). *See also Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 486-87 (3d Cir. 1989) (in a FELA case in which the trial court was required to determine when the plaintiff would retire, trial judge could consider that the plaintiff could retire with full retirement benefits at 65); *Earl v. Bouchard Transp. Co.*, 735 F. Supp. 1167, 1174 (E.D.N.Y.), *modified*, 917 F.2d 1320 (2d Cir. 1990) (the trier of fact in a Jones Act case should consider a party's future intentions and dispositions toward working until a later age).

its prejudicial impact. Although the Superior Court recognized federal appellate case law permitting a balancing analysis for collateral source evidence, it felt constrained by "Pennsylvania" FELA law to find that *Eichel* does not permit such an analysis.

As the Superior Court's opinion demonstrates, lower courts are deeply split on this issue. The First Circuit does "not read *Eichel* as requiring the per se exclusion of collateral source evidence in FELA cases." *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 841 (1st Cir. 1998). Nor does the Fifth Circuit. *See Simmons v. Hoegh Lines*, 784 F.2d 1234, 1237 (5th Cir. 1986) ("[B]enefits may be admissible for the limited purpose of proving another matter.") *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, 371 n.8 (5th Cir. 1982) (*Eichel* does not appear inconsistent with balancing test permitted by Federal Rule of Evidence 403).[18]

On the other hand, the Superior Court in this case has joined the Fourth, Eighth, Ninth and Tenth Circuits and the Iowa Supreme Court in concluding that *Eichel* established an absolute prohibition of any balancing analysis. *See Riddle v. Exxon Transp. Co.*, 563 F.2d 1103, 1107 (4th Cir. 1977); *Vanskike v. Union Pacific R.R. Co.*, 725 F.2d 1146, 1152 (8th Cir. 1984); *Sheehy v. Southern Pacific Transp. Co.*, 631 F.2d 649, 652 (9th Cir. 1980); *Green v. Denver & Rio Grande Western R.R.*

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18. In addition, the Third and Eighth Circuits and the Supreme Court of Missouri have carved out a narrow exception to *Eichel* and allow the admission of collateral source benefits when a plaintiff has opened the door by putting his financial status at issue. *See Moses v. Union Pacific R.R.*, 64 F.3d 413, 416 (8th Cir. 1995); *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483 (3d Cir. 1967); *Moore v. Missouri Pacific R.R. Co.*, 825 S.W.2d 839, 842-43 (Mo. 1992). The Second Circuit has taken the same position, albeit in *dictum*. *Santa Maria v. Metro-North Commuter R.R.*, 81 F.3d 265, 272-73 (2d Cir. 1996).

Co., 59 F.3d 1029, 1033 (10th Cir. 1995); *Snipes v. Chicago Central & Pacific R.R. Co.*, 484 N.W.2d 162, 166-67 (Iowa 1992).[19]

Under this rigid approach, Federal Rule of Evidence 403 and its state counterparts are not available to balance collateral source evidence in FELA cases because *Eichel* supposedly established a per se rule excluding all collateral source evidence in FELA actions. *Sheehy*, 631 F.2d at 652; *Riddle*, 563 F.2d at 1107 ("Nothing in the new Federal Rules of Evidence authorizes departure from the rule so declared [in *Eichel.*]").

This Court should grant certiorari to resolve this split in the lower courts over whether Rule 403 (and similar state rules) are off-limits in FELA cases where collateral source evidence is at issue. Guidance is especially needed because *Eichel* predated the enactment of the Federal Rules of Evidence. Moreover, as the First Circuit noted, the balancing language of this Court's decision in *Eichel* — "the likelihood of misuse by the jury clearly outweighs the value of this evidence," 375 U.S. at 255, is consistent with the balancing analysis required by Rule 403. *McGrath*, 136 F.3d at 841. Finally, even if Rule 403 and its state counterparts can not be used to consider admission of disability benefits, it should at least be available when considering retirement benefits given the critical difference between those benefits and disability benefits and the purposes for which they may be offered.

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19. Although it is not entirely clear, the Third, Sixth and District of Columbia Circuits have also read *Eichel* in a manner that does not seem to admit any exception. *Reed*, 939 F.2d at 134; *Fuhrman v. Reading Co.*, 439 F.2d 10, 14 (3d Cir. 1971); *Wilcox v. Clinchfield R.R. Co.*, 747 F.2d 1059, 1060-61 (6th Cir. 1984); *Lamade v. Wilson*, 512 F.2d 1348, 1350 (D.C. Cir. 1975); *Caughman v. Washington Terminal Co.*, 345 F.2d 434, 435-36 (D.C. Cir. 1965).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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